Supreme Court, U.S.
FILED
SEP 26 2000

No. 00-191

In the Supreme Court of the United States

FEDERAL ELECTION COMMISSION, PETITIONER

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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A. Respondent explains (Resp. 3) that the federal election laws distinguish between so-called "soft money," which "is raised in unlimited amounts from unrestricted sources," and "hard money," which is "raised in limited amounts from restricted sources and fully disclosed according to law." Respondent further explains (*ibid.*) that the instant case involves only the permissible uses of "hard money."

The petition for certiorari acknowledges (at 23) that "[b]ecause 'soft money' cannot lawfully be spent to influence federal elections, the party cannot (even under the court of appeals' decision) use those donations to make coordinated expenditures on behalf of candidates for federal office." We thus do not contend

that "the lower courts broadly and affirmatively established that parties can spend unlimited amounts from any sources in support of their candidates." Resp. 3. And we agree that "[w]hether and how soft money receipts and expenditures should be regulated is not at issue here." *Ibid.*

As we explain in the petition, however, the absence of any federal limit on "soft money" donations increases the corruptive potential of party coordinated expenditures, even though the coordinated expenditures themselves are made with "hard money." See Pet. 23-24. A party committee may direct its coordinated expenditures to candidates favored by a substantial "soft money" donor, and may use those coordinated expenditures to induce the candidate (once elected or re-elected) to look favorably upon that donor's interests. *Ibid.* The existence of that danger is surely relevant to the question whether 2 U.S.C. 441a(d) serves the government's interest in preventing the fact or appearance of political corruption.[1]

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[1] Indeed, respondent contends that "[b]y limiting the ability of parties to use hard money to fund coordinated speech, [2 U.S.C. 441a(d)] perversely drives parties toward less desirable, less regulated soft money activities." Resp. 7. Respondent argues that "[s]triking [section 441a(d)] and allowing parties discretion to spend disclosed and limited hard money will reduce the role of 'large' soft money contributors and alleviate the 'corruption' concerns voiced by the FEC." *Ibid.* The government does not agree with respondent's predictions regarding the likely effect of the court of appeals' decision. At a more general level, however, respondent and the government are in accord that the absence of any federal cap on the permissible amount of "soft money" donations is likely to affect the manner in which party coordinated expenditures are used. The reality of unlimited "soft money" donations is therefore relevant in assessing the practical effects, and the constitutional status, of the "hard money" expenditures that are at issue in this case.

B. Respondent's reliance (see Resp. 5) on *California Democratic Party* v. *Jones*, 120 S. Ct. 2402 (2000), is misplaced. *Jones* involved a State's effort to regulate the internal processes of a political party in a sphere—the selection of a nominee for public office—in which the party's interest in freedom of association is at its height. See *id.* at 2408 ("In no area is the political association's right to exclude more important than in the process of selecting its nominee."). Section 441a(d), by contrast, does not intrude upon respondent's internal processes or limit its freedom to select the candidates and/or positions that it wishes to support. It simply limits the manner in which respondent may use *money* to achieve its objectives. Nothing in *Jones* suggests that a political party is constitutionally entitled to a categorical exemption from the coordinated expenditure limits that apply to individuals and to other political committees.[2]

C. As the petition explains (at 13-15), the effect of the court of appeals' decision is to allow political parties within the Tenth Circuit to make all forms of coordinated expenditures in support of their federal candidates, including coordinated expenditures (such as the

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[2] Respondent contends (Resp. 5) that Section 441a(d) "require[s] political parties to separate themselves from their candidates as a condition of engaging in political speech during an election." The choice is hardly as stark as respondent suggests, however, since Section 441a(d) allows political parties to make coordinated expenditures in amounts far in excess of the limits that apply to other potential supporters of the candidate. See Pet. 5-6, 17-18. And respondent is, of course, permitted to make unlimited independent expenditures in support of the party's candidates.

direct payment of the candidate's bills) that are the functional and constitutional equivalent of direct monetary contributions.[3] Respondent correctly observes (Resp. 6) that Section 441a(d) *also* limits the party's ability to spend money, in coordination with the candidate, on the dissemination of communicative materials to voters.[4] Respondent does not, however, make any effort to refute our contention that the court of appeals' decision gives political parties a First Amendment right to pay their candidates' bills.[5] Nor does

[3] The petition explains that some coordinated expenditures—and, in particular, a supporter's direct payment of the favored candidate's bills—are "functionally and constitutionally indistinguishable from direct contributions" (Pet. 14) even though they "do not involve a transfer of funds to the candidate herself" (Pet. 4). Contrary to respondent's contention (Resp. 5), those statements are in no way inconsistent. Indeed, when this case was previously before the Court, the plurality observed that "many [coordinated] expenditures are * * * virtually indistinguishable from simple contributions (compare, for example, a donation of money with direct payment of a candidate's media bills)." Pet. App. 111a (518 U.S. at 624) (citing *Buckley* v. *Valeo*, 424 U.S. 1, 46 (1976)). For that reason, the plurality explained, "a holding on in-fact coordinated party expenditures necessarily implicates a broader range of issues than may first appear, including the constitutionality of party contribution limits." Pet. App. 112a (518 U.S. at 625).

[4] That a particular party expenditure finances the dissemination of written materials to voters does not necessarily mean that the party's own expressive rights are implicated. If the party disseminates materials whose content is wholly dictated by the candidate, payments made in connection with that effort are not meaningfully different from direct contributions.

[5] Respondent asserts that "[t]he undisputed record shows that political parties have their own messages to disseminate and that 90% of the spending that is curtailed by [Section 441a(d)] historically has been devoted to advertising and mail, i.e., pure speech." Resp. 6. Respondent does not identify, and we are unaware of, any

respondent suggest any basis on which such payments might be distinguished, for constitutional purposes, from direct contributions of money.

D. Contrary to respondent's assertion (Resp. 7), the pertinent legislative history reflects congressional concern about the potential corruptive effects of campaign spending by political parties—and, in particular, the danger that large party contributions could be used as a means of evading statutory limits on individual donations. That concern was expressed during Senate debate in 1973 on a predecessor bill to the one finally enacted in 1974. Senator Mathias explained:

> We have controlled the line which runs from the individual to the candidate to a $3,000 limit. We have controlled or limited the flow from a political committee to a candidate to $5,000. We have limited or controlled the line which flows from an individual to a political party to $100,000.
>
> But what this amendment really goes to is one of the areas which is not controlled, and that is from the party to the candidate. That, of course, is a wide open avenue. An [individual] who could contribute $100,000 to a party could well envision that that money, by some arrangement, would be directed to a candidate. Such arrangements are not unknown. They may be informal, but earmarking would be possible. This amendment would prevent that kind of indirect contribution of $100,000 to a single

record material(s) that would support the 90% figure. Respondent also states that "[t]he Petition (at 14) inaccurately portrays a political party as a 'simple expedient' for candidate bill paying." Resp. 6. Even a cursory examination of page 14 makes clear that the petition says no such thing.

> candidate by a single contributor. I think it is a loophole which needs to be looked at very carefully.

119 Cong. Rec. 26,321 (1973).[6] Senators Kennedy and Pastore observed, based on their prior experience as legislators, that through unspoken understandings donors could achieve the result that Senator Mathias described—*i.e.*, using the party as a conduit for large contributions to candidates without any explicit earmarking of funds. See *id.* at 26,323, 26,323-26,324. Although the provisions ultimately enacted in 1974 differed in some respects from those debated during the previous year, the 1973 debate casts significant light on the interests that Section 441a(d) was intended to serve.

E. As respondent points out (Resp. 8), this Court's decision in *Nixon* v. *Shrink Missouri Government PAC*, 120 S. Ct. 897 (2000), did not involve limits on the campaign spending of political parties. But while *Shrink Missouri* does not control this case, its reasoning bears directly on the question presented here. *Shrink Missouri* reaffirms the legislature's power to enact reasonable contribution limits in order to address the "improper influence" and "opportunities for abuse" that may result when an elected official becomes unduly

[6] The amendment to which Senator Mathias referred was offered by Senator Stevenson (see 119 Cong. Rec. at 26,320) and would have had the effect of subjecting party committees to the same spending limits as other political committees. See *id.* at 26,321 (Senator Stevenson states that the amendment would "have the effect of equalizing the amount to party political committees and all other political committees"). The bill ultimately enacted in 1974 permits political parties to make substantially larger coordinated expenditures in support of federal candidates than other political committees are allowed to make. See 2 U.S.C. 441a(d); Pet. 5-6, 17-18.

dependent on financial support from a single source. See *id.* at 905 (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 28 (1976)); Pet. 24-25. If (as we contend) Congress may reasonably determine that the same concerns are implicated by large party coordinated expenditures, then *Shrink Missouri* substantially supports the constitutionality of Section 441a(d).

F. Respondent agrees (Resp. 2-3) that the petition for a writ of certiorari should be granted. As respondent explains, "[a] definitive ruling is needed" (Resp. 2): the court of appeals' decision creates significant uncertainty regarding the spending practices in which political parties may engage, and it impedes the uniorm application of the federal campaign finance laws.[7] For those reasons, and because the court of appeals has held a provision of an Act of Congress to be unconstitutional, review by this Court is warranted.

[7] In *Missouri Republican Party* v. *Lamb*, No. 00-1773 (8th Cir. Sept. 11, 2000), a divided panel of the Eighth Circuit recently held that a state-law limitation on cash and in-kind contributions by political parties to candidates violates the party's First Amendment rights. The court rejected Missouri's contention that the contribution limit serves to prevent actual or apparent political corruption, stating that "it is not easy to see how a party could 'corrupt' one of its own candidates, since, on account of their general unity of purpose, they are committed, in the main, to the same aims and principles." Slip op. 5. The court relied in part on the Tenth Circuit's decision in the instant case. See *id.* at 5, 6. The dissenting judge would have upheld the law on the ground that "contributions made by a political party are no different than contributions made by individuals or other groups." *Id.* at 13 (John R. Gibson, J., concurring and dissenting). He concluded that "[b]ecause Missouri's limits on cash contributions that a party may make to a candidate are closely drawn to meet a sufficiently important governmental interest, they do not violate the First Amendment." *Ibid.*

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For the reasons stated above, and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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SEPTEMBER 2000